United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

74-1258

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1258

NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent;

CELANESE CORPORATION, ET AL.,

Intervenors.

On Petition For Review Of Action Of The
Administrator Of The Environmental
Protection Agency

REPLY BRIEF FOR INTERVENORS

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September 16, 1974

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REPLY BRIEF FOR INTERVENORS

Through a series of relatively recent pronouncements, including its brief in this case, EPA has added a note of mystery into the interpretation of the Federal Water Pollution Control Act ("the Act"). Like a magician, EPA has attempted to create the illusion that a section of the Act does not exist. The section is Section 304, 33 U.S.C. §1314, a key component of the Act. The implementation, or lack thereof, of Section 304(b) constitutes the heart of this action.

Section 304(b) requires EPA to promulgate within one year of enactment of the 1972 Amendments to the Act regulations constituting effluent "guidelines". These regulations are to identify the pollution reduction attainable through two levels of technology

(one for implementation by July 1, 1977 and the other to be attained by July 1, 1983) and to specify the factors which permit-granting authorities (whether EPA or State agencies) must take into account in applying that technology to individual point sources. Yet, in the view of both Respondent EPA and Petitioner Natural Resources Defense Council (NRDC), Section 304 of the Act is so inconsequential that it is mentioned in their briefs only in the context of explaining away its provisions. It has been left to the Intervenor chemical companies and to the amici curiae to shed any light on Section 304.

This action ostensibly was brought to review only a single clause repeated verbatim in nine separate but related regulations of the EPA. The nine regulations each pertain to a different industry "category" and arguably constitute "guidelines for effluent limitations" on the water discharges from plants in the given categories, under Section 304(b) of the Act, 33 U.S.C. §1314(b). EPA inserted the clause in each of the nine final regulations after the regulations had been published for comment in proposed form. The attack on the single clause raises a set of interdependent issues respecting the entire legal status and fundamental authority for the regulations themselves. Since EPA has or will publish similar regulations for all major segments of American industry, it is not surprising that this action has assumed "test case" proportions.

The issues posed in this action are so basic to the interpretation of the Federal Water Pollution Control Act that, once they are authoritatively resolved, they are unlikely to recur in a judicial

context. Numerous actions are pending in Federal courts throughout the nation which raise these issues. The intervening chemical companies regret only that this particular action was framed so narrowly by Petitioner that it raises these basic issues in the abstract, without any particular reference to the substantive aspects and implementation of the guideline regulations, for the Court might find that these other aspects of the regulations would put the legal issues in better perspective.

The commonly-present clause provides that if an industrial plant subject to the guidelines can prove that its circumstances are "fundamentally different" from the factors EPA used in drawing up the guidelines, EPA will "establish for the discharge effluent limitations in the NPDES permit" which vary from the values present in the guidelines. (E.g., 40 C.F.R. §412.12 (Feedlots Category), added by 39 Fed. Reg. 5703, 5707 (February 4, 1974).) All dischargers in the nation must obtain a permit for their discharge under the "National Pollutant Discharge Elimination System" ("NPDES") established by Section 402 of the Act, 33 U.S.C. §1342. Conditions in the NPDES permit for an industrial plant or other discharge contain the actual limitations applicable to a discharge.

This litigation boils down to whether EPA's regulations relating to effluents from the various industry categories are objective "guidelines" to be used as the basis for individual plant permits or whether they are "limitations" which must be mechanically inserted into a permit for a plant. The issue of the jurisdiction

of this Court to hear this action is intertwined with the merits.

Petitioner NRDC contends that the Act requires EPA to establish and prescribe by regulation directly under Section 301 "nationwide, uniform effluent limitations" which must be inflexibly and mechanically applied to all point sources within each industrial category and class. (Pet. Br., at 35-39.) Even though Section 304 explicitly commands EPA to issue regulations in contrast to Section 301 which says nothing about regulations but rather calls for certain objectives to be "achieved", NRDC says that "it is under §301 that the rule or standard will be supplied" and that "information developed under §304 will perform the lesser duty of facilitating the administration of the system". (Pet. Br., at 27.) NRDC implies that the EPA regulations, as limitations under Section 301, subsume in part the Section 304 guidelines and that the "Development Documents" which EPA provided for each of the major categories (which are not part of the regulations) "are a part of the rulemaking and constitute the main portion of the §304(b) effluent limitation guidelines". (Pet. Br., at 42.) NRDC attacks the flexibility provision as an unauthorized deviation from Section 301 on the ground that limitations set in regulations must be uniform.

Respondent EPA asserts that its regulations are somehow both Section 301 effluent limitations and Section 304 effluent guidelines. (Resp. Br., at 22.) However, EPA assigns legal purpose and effect to the regulations only insofar as they are Section 301 effluent limitations. EPA does not provide an explanation of which parts of the

regulations are to be guidelines nor does it ascribe any function to guidelines beyond saying that "304(b) guidelines are merely definitional of the statutory norms for Section 301(b) effluent limitations" (Resp. Br., at 22) but without saying what is defined. EPA does not seek to support its limited flexibility provision by reliance on Section 304; rather, it urges that as an administrative agency it has a general authorization to allow a "safety valve" for plant situations that would be inequitably dealt with by otherwise inflexible limitation regulations. (Resp. Br., at 43-45.)

Intervenors (Celanese Corporation and nine other chemical companies)[1/] take the view that Congress has commanded EPA to issue "guideline" regulations of a specified content under Section 304 and that EPA must be held to that mandate. The EPA regulations cannot be effluent limitations under Section 301 because the Act does not authorize EPA to issue such regulations and their issuance would contravene the statutory scheme. As Intervenors read Section 304(b), it requires EPA to issue "guideline" regulations which (1) identify numerically a range of effluent reduction values which existing plants can attain using the appropriate technology, and (2) specify in detail objective criteria based on factors identified in Section 304(b), which bear on and must be taken into account in applying the appropriate technology to individual plants. The guideline regulations

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1/ Union Carbide Corporation, Monsanto Company, American Cyanamid Company, FMC Corporation, Olin Corporation, The Dow Chemical Company, E. I. DuPont de Nemours & Company, Allied Chemical Corporation, and Hercules Incorporated.

are to be used by permit grantor (EPA or the State) to set effluent limitations for individual discharges as conditions of permits. The range of numerical values in the guideline regulations serve as the bounds on the permit grantor's discretion, and his selection of a limitation is to be made considering the factors specified in the regulations. Intervenor chemical companies in this context view EPA's special flexibility clause as redundant and unnecessarily restrictive.

The jurisdictional views of the parties stem from their position on the merits. Section 509 of the Act contains a special provision for review in the Courts of Appeals of specified actions of the Administrator of EPA. As NRDC says: "Section 509 does not provide for review by the Courts of Appeals for §304 effluent limitations guidelines. If that is all EPA did or can do, then this Court does not have jurisdiction over this petition". (Pet. Br., at 19.) NRDC, of course, argues that the EPA regulations are limitations under Section 301, that Section 509(b)(1)(E) of the Act permits this Court to review EPA's actions in approving or promulgating limitations, and, therefore, that this Court has jurisdiction over this action. EPA similarly claims that it has promulgated Section 301 limitations and that the Court has jurisdiction, but adds that since the regulations are also Section 304 guidelines this Court should find an "ancillary" jurisdiction over, and decide the issues posed respecting the regulations in their guise as "guidelines". (Resp. Br., at 23.) The chemical companies challenge jurisdiction on the grounds that under the Act EPA had to issue guideline regulations, not limitations,

and Congress simply did not provide for review of the guideline regulations in the courts of appeals.

Each of the three amici agree with the chemical company intervenors that EPA has no authority to promulgate limitation regulations under Section 301. Each also concludes that the flexibility provision is redundant and unduly limiting if the regulations are guidelines, but point out that it is essential if the regulations are in fact limitations. The amici emphasize that the jurisdictional questions should be resolved independently of the merits.

EPA has supplemented its argument by asserting that "a substantial adverse impact upon the effectiveness of the 1972 Amendments" to the Act would occur if this Court accepted Intervenors' arguments. (Resp. Br., at 37.) EPA does not, however, offer any explanation of just how that would happen.[1/] NRDC makes much the same claim, but it at least offers a reason for it. NRDC fears that unless EPA sets inflexible and absolute limitations by regulation, "the responsibility of standard setting for existing discharges will ship [sic] inevitably from the Administrator to the states". (Pet. Br., at 43.) NRDC evidently as a policy matter believes that Federally-approved State permit programs, operating subject to presumptively-applicable guidelines regulations and to a permit-by-permit Federal EPA veto, would

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1/ EPA's brief does contain considerable rhetoric: "Every polluter would like to delay the effective date of pollution standards and limitations" (Resp. Br., at 26); "Any industry regulated by a Federal agency would appreciate the opportunity to emasculate the agency by undermining its regulatory powers" (Resp. Br., at 27); and Intervenors' construction of the Act is an "incredible distortion" of the Act's provisions (Resp. Br., at 26).

not be effective.

But, Congress sets policy, not NRDC. Contrary to NRDC's and EPA's claims, Congress has specifically set out in the Act a system for attaining technological pollution reduction objectives. Congress did not leave to "implication" any of the major steps it wanted EPA to pursue in reaching the Act's objectives. It certainly did not leave to implication the chief regulatory authority affecting all existing discharges of waste water effluents in the United States. By arguments in this Court and in other Courts, EPA is seeking to rewrite the Act.

Part of the difficulty with EPA's (and NRDC's) approach is that its legislative redrafting effort introduces adverse collateral consequences apart from the main issue of the role the regulations are to play in permit proceedings. As an example of the distortions produced if EPA's regulations are limitations under Section 301, anyone who wishes to contest or challenge a portion of the regulations, even insofar as they pertain to measures to be implemented in 1983, nine years from now, must have challenged the regulations in the Courts of Appeals within 90 days of their issuance. After the 90-day period had elapsed, "limitation" regulations could not thereafter be challenged, questioned, or otherwise subjected to judicial review. (§509(b)(2), 33 U.S.C. §1369(b)(2).) Otherwise, the regulations, if they be limitations, would be final.[1/] Furthermore, a violator of such

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1/ A very limited exception would be provided by the last sentence of Section 509(b)(1), which allows later review of regulations covered by that section "only if such application [for review] is based solely on grounds which arose after such ninetieth day".

"limitation" regulations would be subject to substantial criminal and civil penalties under Section 309. See Pet. Br., at 23-24. On the other hand, if limitations were set with precision in conditions found in permits issued to individual dischargers, as Intervenors and the amici contend, there is a more defensible basis for imposing criminal sanctions in appropriate cases.

In its brief, EPA did not offer any detailed analysis of the Act to support its position. It did not offer a construction of the various provisions of the Act which would give each provision a place in a harmonious, complete statutory scheme. It mocked the efforts of the intervening chemical companies to give effect to all of the Act's provisions as being an "incredible distortion". (Resp. Br., at 26.) 1/ To achieve its ends, it relied on generalizations, i.e., chiefly on the Act's general rulemaking grant of authority (§501(a)), and on a rewrite of the legislative history.

But the issue is not whether EPA has rulemaking authority. Rather, the issue is how EPA is to exercise the authority Congress has given it. By making only the most general arguments, EPA has made it difficult for this Court to parse the detailed and interlocking provisions of the Act, give effect to them all, and arrive at a satisfactory resolution of the issues in this case. This Court must accept the challenge thrust before it.

1/ NRDC at least came to grips with many of the issues of statutory construction in the case. (Pet. Br., at 19-31.)

I. EPA'S INTERPRETATION OF SECTION 301 REQUIRES THE COURT TO READ SECTION 304(b) OUT OF THE ACT

EPA ignored Section 304(b) in stating its view of its obligations under the Act: "Respondent [EPA] recognizes that the Act calls for the Environmental Protection Agency to promulgate national regulations that will identify effluent limits for categories of point sources which can then be applied to individual discharges through permits issued pursuant to Section 402 of the Act". (Resp. Br., at 38.) (If EPA would have used the word "guidelines" rather than "limits" in its statement, it would have stated its obligation correctly.) All EPA says about Section 304(b) is that the "304(b) guidelines are merely definitional of the statutory norms for Section 301(b) effluent limitations". (Id., at 22.)

Despite the fact that EPA now embraces Section 301 so thoroughly, the embrace is not without its awkward aspects, even for EPA. On one hand, EPA argues that by "implication . . . effluent limitations must be established so that a norm would exist which could be achieved". (Resp. Br., at 29.) On the other hand, EPA says Congress has imposed upon it "an almost overwhelming administrative burden" by directing it

> "to identify and classify American industry in all its diversity giving due consideration to the extensive variables among the plants which necessarily affect the type and amount of pollutants discharged, as well as the capability to control such discharges (e.g., process employed, age and location of plant, product produced)." (Resp. Br., at 38.)

Because of the complexity of its task, especially for existing

plants, EPA argues that it must be able to adopt the variability clause as an escape hatch or "safety valve". (Resp. Br., at 44.)

EPA should stop creating problems for itself, which it then seeks to solve by arcane procedures such as the variability provision. So much of this case has been taken up with extensive claims and argument respecting Section 301 that it might be helpful to focus only on Section 304(b) for a moment. After all, it is Section 304(b), not 301, which contains a Congressional command to EPA to promulgate regulations within one year of the enactment of the 1972 Amendments. Section 301(b) simply requires achievement of objectives and standards contained in regulations promulgated under other sections of the Act. It contains no direction that rulemaking authority be exercised. It does not even authorize the exercise of rulemaking power. In Section 304(b) Congress provided for "guideline" regulations which carry an important normative aspect, and yet are flexible.

For both the 1977 and the 1983 levels of technology, Section 304(b) commands EPA to "(A) identify . . . the degree of effluent reduction attainable . . . for classes and categories" and to "(B) specify factors to be taken into account in determining the control measures and practices applicable to point sources . . . within such categories or classes". (§304(b)(1).) 1/

1/ Perhaps surprisingly in light of the regulations it has published, EPA said in its brief that "These Section 304(b) guidelines must identify the characteristics of pollutants and the amount of reduction attainable through application of the Section 301 tests. The guidelines must also specify the factors considered in establishing effluent limitations". (Resp. Br., at 20.) This statement very nearly amounts to a tacit confession of error.

Congress contemplated that ordinarily EPA would use a range of values for a subcategory in the guidelines.[1/] This range of numerical values would serve as the outer bounds of any permit issued to any plant within a subcategory, except possibly for a very unusual facility. In permit proceedings, one number from the range would be chosen for a particular plant, based on an evaluation of the second part of the guideline regulations, i.e., the factors bearing on the applicability of the technology to that plant. As Section 304(b)(1)(B) flatly states, these factors are "to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes". (Emphasis added.)

Somewhere along the line EPA dropped any pretense that its regulations would meet the requirements of Section 304(b). It invariably chose a single numerical value rather than a range to identify the pollution reduction attainable. It decided not to do anything at all to meet its obligation to specify, elaborate, or clarify the factors to be taken into account in applying the technology-derived numbers to individual plants.

Moreover, after the guideline regulations are initially published, Section 304(b) requires that EPA shall review them annually and to "revise, if appropriate, such regulations" if the annual review

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1/ Perhaps in a product or process of unusual lack of variability, a single number would be appropriate.

shows a need for revisions. How can EPA possibly review the guideline regulations annually if it cannot even point to something which can be identified as a guideline regulation?

EPA's brief deals with none of these omissions. It seems to have adopted the view that the best defense against the contentions of the intervening chemical companies is a simple one: it should "stonewall" it or ignore its transgressions altogether.

EPA and NRDC would have this Court believe that Section 304 has slipped into obscurity because the truly important prescriptive or normative action is being taken under an implied authority found in Section 301. But oddly enough, in another Court of Appeals both EPA and NRDC are taking the inconsistent position that EPA is promulgating guideline regulations, and have said nothing at all about regulations establishing limitations.

In Natural Resources Defense Council, Inc. v. Train, No. 74-1433 (D.C. Cir.), EPA has taken an appeal from an order of the District Court[1/] prescribing a schedule by which EPA must issue guideline regulations to come into belated compliance with Section 304(b)'s requirement that such regulations be promulgated within one year of enactment of the 1972 Amendments. In its opening brief as appellant in that case, EPA described the action as follows:

1/ This order is reported as Natural Resources Defense Council, Inc. v. Train, 6 E.R.C. 1033 (D.D.C. 1973).

> "On August 14, 1973, the Natural Resources Defense Council, Inc. (hereafter NRDC), filed this action against the Administrator of the Environmental Protection Agency and the Environmental Protection Agency (hereafter referred to collectively as the Administrator) seeking a declaratory judgment that Section 304(b)(1)(A) of the Federal Water Pollution Control Act Amendments of 1972 (hereafter FWPCA) created a ministerial, non-discretionary duty in the Administrator to publish effluent limitation guidelines for all classes and categories of point sources covering all point source discharges of pollutants by October 18, 1973. NRDC also sought an order--essentially a mandatory injunction--directing the Administrator to publish as expeditiously as possible and according to a schedule approved by the district court, effluent limitation guidelines under Section 304(b)(1)(A) covering all point source discharges, with the last guideline to be published no later than April 1, 1974 (App. 28-29, Complaint, pp. 2-3)." (Appellant's Brief in No. 74-1433, D.C. Cir., at 3-4) (emphasis added).)

In NRDC's brief as appellee in the case, it described its purposes in bringing the action as seeking prompt promulgation of the guidelines such that they could be applied in permit proceedings:

> "These Section 304(b)(1)(A) guidelines must be promulgated within one year of enactment of the Act--by October 18, 1973--in order to provide time to apply these guidelines to all point sources through the permits which must be issued by December 31, 1974, by the Administrator or by states. In either case, the permits must comply with the same uniform national

effluent limitation standards.[35/]

> "Thus, the effluent limitations guidelines established under Section 304(b) are critical to achievement of the Act's entire pollution abatement scheme for point sources."

> "35/ See Section 402(d)(2), 33 U.S.C. §1342(d)(2); Leg. Hist. 176 ('Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under Section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure compliance with such guidelines and requirements.' (Italicization in original))." (Appellee's Brief in No. 74-1433, D.C. Cir., at 13) (emphasis added to quoted text but not footnote).)

In that case, EPA also said that it knew it was under a duty to issue guideline regulations and that it was complying:

> "The Administrator now recognizes that he was and is under a clear duty to issue effluent limitation guidelines covering at least those 27 general categories of point sources set forth in Section 306(b)(1)(A) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), and does not dispute the propriety of the district court's order that he issue such effluent limitation guidelines. The Administrator is proceeding as quickly as humanly possible to issue such guidelines. To date, the Administrator has promulgated effluent guidelines covering, in whole or in part, 23 of the 27 specified categories. The remaining four categories--seafood, iron and steel manufacturing, textile manufacturing, and steam electric power plants--should have effluent limitation guidelines,

> covering these categories in whole or in part, by no later than August 30, 1974. Effluent limitation guidelines covering the remaining portions of these categories will be promulgated as soon as scientifically, technically, and humanly possible. Promulgation of guidelines based on less than adequate technical and scientific bases serve no one's purpose other than those who wish to delay and frustrate the congressionally established goals by repeated judicial challenges to the validity of the guidelines." (Appellant's Brief in No. 74-1433, D.C. Cir., at 12-13) (emphasis added).)

From the perspective of the intervening chemical companies, however, it appears that both EPA and NRDC are telling the D. C. Circuit that EPA is required to issue guideline regulations under Section 304(b) such that EPA can use those guideline regulations to fix limitations in permits, whereas here both EPA and NRDC have conveniently forgotten about Section 304 in favor of bootstrapping their way into discovering an implied authority in Section 301 to set inflexible limitations by regulation.

II. EPA HAS NO AUTHORITY UNDER SECTION 301 TO PROMULGATE EFFLUENT LIMITATIONS BY REGULATIONS

Section 301 contains no express provisions authorizing or directing EPA to promulgate effluent limitations by regulations. Section 301 does, however, have express provisions on regulations to be issued under other sections. Subsections 301(b)(1)(A) and 301(b)(2)(A) make several references to "regulations issued by the Administrator pursuant to Section 304(b)(2) of this Act". This is particularly significant since the Congress in the other major sections of the Act expressly provided for regulations (see e.g., Sections 302 (water quality), 306 (new source standards), 307 (toxic and pretreatment effluent standards)). In a statute as complex and detailed as the FWPCA with as many provisions for regulations, it would be strange indeed if Congress were to leave such an important regulatory authority as Section 301 to implication.

EPA says the intervening chemical companies have not cited enough legislative history to support our contention that there is no room in the statutory scheme for EPA to set effluent limitations by regulation:

> "The silence of the Chemical Industry on the legislative history of the Act is understandable. Not one word of it, if read in context supports their preposterous contention." (Resp. Br., at 27).

NRDC did not believe our opening brief was so silent. (Pet. Br., at 26.) We agree with EPA, however, that we certainly should have

included one further reference. NRDC's brief in the case in the D.C. Circuit helpfully points out something we had not called to the Court's attention. It refers to a passage from Senator Muskie's summary of the Conference Committee's deliberations[1/] which clearly, and even emphatically, demonstrates that the permit-issuing authority, whether a State or EPA, is to apply Section 304 guideline regulations in permit proceedings, not regulations establishing limitations under Section 301:

> "NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM [SECTION 402]
>
> "The Conference agreement provides that the Administrator may review any permit issued pursuant to this Act as to its consistency with the guidelines and requirements of the Act. Should the Administrator find that a permit is proposed which does not conform to the guidelines issued under section 304 and other requirements of the Act, he shall notify the State of his determination, and the permit cannot issue until the Administrator determines that the necessary changes have been made to assure

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1/ In Senate debate, when introducing this summary, Senator Muskie said:

> "Mr. President, I have prepared and wish to include in the record as part of my remarks a discussion of each of the significant provisions of the bill. I do this because the complexities of the individual provisions are such that the legislative history will be important to those charged with the responsibility for administering the program. At the same time, however, I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to write into law as clearly as possible the intent of Congress." (118 Cong. Rec. S. 16870 (daily ed. October 4, 1972), Leg. Hist., at 163-64 (emphasis added).)

The Senate Committee on Public Works has published a legislative history of the Act. Senate Committee on Public Works, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (Committee Print). Citations to this compilation in this brief will be: "Leg. Hist. ___."

compliance with such guidelines and requirements." (118 Cong. Rec. S. 16875 (daily ed. October 4, 1972), Leg. Hist. 176 (emphasis in original).)

In its opening brief in this action, the NRDC said that "[s]ome of the legislative history is unhelpful on this precise point." (Pet. Br., at 35.) They were correct, but for reasons other than the ones they stated.[1/]

In contrast, EPA's interpretation is so far removed from the statute that it attempts in its brief to rewrite the legislative history to fit the new interpretation. Thus, EPA's brief (p. 29) makes the following quotation from the Senate Report:

> "The program proposed by this Section [301] will be implemented through permits issued in Section 402. The Administrator will have the capability and mandate [by promulgating effluent limitations] to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second." (S. Rep. No. 92-414, 92d Cong., 1st Sess. 42 (1971), Leg. Hist. 1460.)

1/ In addition to the legislative history cited supra and the materials previously relied upon by Intervenors and the amici, helpful guidance is found in the Congressional debate and disposition of amendments respecting the scope of EPA's oversight, review, and veto authority over State programs and State-issued permits.

For example, in the House, Congressman Podell offered an amendment which would have eliminated State discretion in issuing permits. The amendment was defeated. 118 Cong. Rec. H. 2634-35 (daily ed. March 28, 1972), Leg. Hist. 574-576. Congressman Podell had supported his amendment by complaining that "there are no (Federal) standards but merely guidelines and there is a substantial difference." (Id., at H. 2635, Leg. Hist. 576 (emphasis added).) See also Brief Amici of Allegheny Power System, et al., at 27.

The underlined words in brackets were added to the quotation by the Government without any explanation or justification. Indeed, these added words are so extraneous that the Government does not even pretend that it is inserting a reference for the Court's convenience. This doctored quotation, the Government says, "implies" that EPA must establish effluent limitations under Section 301. The inconsistency of this doctoring of the legislative history with the remaining legislative history is shown by the colloquy between Senator Muskie (a principal supporter and author of the bill) and Senator Mathias:

> "Mr. Mathias. Does Section 301(b)(2)(A) on page 76 contemplate that a State or the Administrator, if appropriate, might be able to set the 1981 effluent limitations almost on an individual point source by point source basis?"
>
> "Mr. Muskie. Section 301(b)(2)(A), as well as Section 301(b)(1) anticipates individual application of controls on point sources through the procedures under the permit program established under Section 402.
>
> "Mr. Muskie. . . . The information under Section 304(b) is to be applied in setting effluent limitations." (117 Cong. Rec. S. 17454 (daily ed. Nov. 2, 1971), Leg. Hist. 1391 (emphasis added).)1/

EPA's brief at pages 26-36 quotes extensively from the legislative history but can point to no part of the history explicitly adopting its view of the Act. While EPA's brief asserts the legislative history is clear, the argument must depend on "clear

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1/ The omitted part of the quotation dealt with a question by Senator Mathias on Section 304(a)(1) relating to water quality.

implication" (Resp. Br., at 29), "imply" (id.), "can only be seen" (id., at 31), and "implicit interpretation" (id., at 33). The absence of any straightforward reference to regulations under 301 confirms that Congress never contemplated such regulations.

In fact, the Committee Report on the House amendments to S. 2770, the bill that became law, characterized Section 304(b) as requiring "the Administrator . . . to publish . . . regulations for the establishment of effluent limitations", not regulations establishing effluent limitations. (H. Rep. No. 92-911, 92d Cong., 2d Sess., at 107 (1972), Leg. Hist. 794 (emphasis added).) The Conference Report reiterated the Administrator's role under Section 304(b) as one of promulgating "regulations providing guidelines for effluent limitations", not regulations providing or establishing effluent limitations. (S. Rep. No. 92-1236, 92d Cong., 2d Sess., 124-125 (1972), Leg. Hist. 307-308 (emphasis added).)

EPA nonetheless argues that subsections (d) and (e) of Section 301 demonstrate that Congress intended to establish, review and revise effluent limitations under Section 301. (Resp. Br., at 15.) In fact, those subsections demonstrate the contrary.

Subsection 301(d) provides:

> "(d) Any effluent limitations required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph." (Emphasis added.)

The only "procedure" established by paragraph (2) of subsection (b) is the provision that effluent limitations for 1983 shall require the application of best available technology economically achievable "as determined in accordance with regulations issued by the Administrator pursuant to Section 304(b)(2) of this Act . . ." (§301(b)(2)(A)). Thus, the "procedure" which subsection (d) refers to is regulation under Section 304.

This becomes all the more apparent in considering the purpose of subsection 301(d) and the provisions of Section 304(b). The purpose of subsection (d), as the Senate Report explained, was to provide for the program after 1981 (1983 in the final bill). Thus, the Committee said (with reference to Section 301(c) which became 301(d) in the final bill):

> "The Committee established a procedure to continue the program beyond 1981. Under this provision, the procedures and requirements of Phase II would be repeated every five years for those sources of pollution which could not have to achieve the no discharge requirement in Phase I (if required to meet water quality standards) or Phase II, or in an earlier five-year phase." (S. Rep. No. 92-414, 92d Cong., 1st Sess. 46 (1971), Leg. Hist. 1464.)

The five-year period was selected because the Senate bill, S. 2770, provided for the best practicable standard to be achieved by 1976 and the best available standard to be achieved by 1981--a five-year interval. (S. 2770, 92d Cong., 1st Sess. (1971), Leg. Hist. 1608-1610.) Further-

more, a permit issued under Section 402 ordinarily has a five-year term. (§402(a)(3), (b)(1)(B).) Thus, subsection (d) was designed to direct the Administration for each five-year period after 1981 to redetermine by regulations under Section 304 the best available standard for all industries which were not then subject to a no-discharge standard.

We agree with the EPA that Congress intended that EPA's regulations be periodically reviewed and revised, but that is expressly provided for in Section 304. Section 304(b) directs the Administrator to issue regulations providing guidelines for effluent limitations, and "at least annually thereafter, revise, if appropriate, such regulations". The Government's strained interpretation would confine the revision to five-year intervals after 1983 and render the provision for annual review under Section 304(b) utterly meaningless.

Subsection (e) of Section 301 provides:

> "(e) Effluent limitations established pursuant to this section or to Section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

In the light of subsection (d) the procedure for establishing effluent limitations under 301 is by regulations under Section 304(b) and the limitations are applied to all point sources under Section 402 "in accordance with the provisions of this Act".

NRDC makes one argument (Pet. Br., at 23-24) based on Section 309(a)(3) and 309(d) which EPA eschews. Section 309(a)(3) provides:

> "(e) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of Sections 301, 302, 306, 307 or 308 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of tnis section."

Section 309(d) provides for criminal penalties. The reference to Section 301 in these subsections of Section 309, NRDC asserts, shows that Congress expected the Administrator to establish criminally enforceable effluent limitations under Section 301 itself. (Pet. Br., at 23-24.) The reverse is correct. Under Section 301 all discharges not covered by a permit are unlawful. If a discharger has a permit application pending he is not in violation for unpermitted discharges up to December 31, 1974. If he has a permit, compliance with a permit is compliance with Section 301. (§402(k).) If he has no permit any discharge violates Section 301(a) regardless of the nature of the discharge. There is no place in the enforcement scheme for criminal enforcement of effluent limitations established by regulations under an authority implied from Section 301(b) which could only have the effect of modifying the flat prohibition in Section 301(a).

Moreover, NRDC is surely misguided in making its strident call for implication of authority in EPA to promulgate effluent limitation regulations under Section 301(b) such that criminal penalties can be inflicted upon violators of the regulations themselves. To

the contrary, this Court should abide by the canon of construction that Congress must leave nothing to implication where criminal penalties are involved. Indeed, the provision in Section 309 for criminal sanctions is arguably defensible only when applied respecting "limitations" which apply specifically to an individual discharger by virtue of their existence as condition in a permit, or when applied to Section 301(a)'s prohibition on making any discharge without a permit.

Another argument--a policy argument--pressed by NRDC but not endorsed by EPA is that there must be authority to issue effluent limitation regulations under Section 301 because otherwise the matter would be left to the States; uniformity would be lost and pollution havens would be created. It is not surprising that EPA failed to embrace this argument, for Congress made it clear that control of pollution was to be largely administered by the States. (See §§402(b)-(f), 510.) But this does not mean the downfall of the program as NRDC fears. The Act carefully established goals to be achieved and the means of achieving them. Direct control over effluent discharges is achieved under the permit system which is to apply the guidelines under Section 304(b) or other applicable standards. Indeed, Congress went farther; it required the Administrator to specify the technology, the reductions in discharges that can be achieved and the factors respecting the technology the States are to consider in fixing effluent limitations in permits as they apply to the guidelines and standards. To convert

this carefully structured system into a mechanical application of a single number distorts the whole scheme of State responsibility.

Finally, EPA's interpretation makes significant provisions of Section 509 redundant and meaningless. Section 509(b)(1) provides:

> "(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under Section 306, (B) in making any determination pursuant to Section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under Section 307, (D) in making any determination as to a State permit program submitted under Section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under Sections 301, 302, or 306, and (F) in issuing or denying any permit under Section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person . . . ." (Emphasis added.)

While subparagraph (A) provides for review of standards of performance under Section 306 (new sources), the reference in subparagraph (E) to an effluent limitation approved or promulgated under Section 306 is not ineffective. Indeed, the distinction found in Section 509(b)(1) demonstrates that an "effluent limitation or other limitation" in subparagraph (E) must be interpreted to include only the limitation itself, not the standard or guideline from which it came.

Then too, in Section 509(b) Congress chose to provide for special Court of Appeals review of certain standards such as the Section 306 standards for new plants. It did not do so for the Section

304(b) guidelines for discharges from existing plants.[1/] But the reason for this is apparent. The guideline route as opposed to standards was chosen for existing plants because of their diversity. Guidelines were also subject to annual revision and review by EPA. And, review in Courts of Appeals with a ninety-day limitation after promulgation would have required that the guideline regulations for 1983 would have had to have been reviewed nine years before they became effective, and that borders on the ridiculous.

Moreover, EPA offers no explanation of the meaning of the word "approving" in subsection 509(b)(1)(E). It suggests that the approval is under subsection 301(c) or (d). (Resp. Br., at 13, n. 5). But this is nonsense. Subsection 301(c) authorized the Administrator to grant

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1/ One Congressman, Representative Terry of New York, complained about the lack of a special review provision for Section 304 guidelines. In his Statement of Supplemental Views to the House Report, he said:

> "Section 509, which deals with administrative review procedures, requires an application to U.S. District Court within 30 days of EPA determinations subject to review. Here administrative reviews is [sic] possible, but the time allowed is much too short. It is my feeling that the time allowed should be doubled. Many other significant areas in the legislation where the administrator has a great deal of discretionary action are, however, without such review. These include Section 204, the construction grant limitations and conditions, Section 303, the water quality standards and implementation plans, Section 304, the Federal guidelines, and Section 402, the permit program.
>
> "Since the permit program is fundamental to implementation of the Act, and guidelines promulgated by EPA under Section 304 are key to the pollution control conditions for discharge under the permits, whether issued by EPA or by a state after EPA approval of a State program, an administrative review procedure of Section 304 guidelines, prior to their promulgation, and EPA approval or disapproval of State permit programs is essential. Otherwise, the so-called primary State role is not meaningful." (H. Rep. No. 92-911, 92d Cong., 2d Sess. 424 (1972), Leg. Hist. 892.)

variances to the 1983 objective after an agency proceeding; no approval of limitations is involved. Subsection 301(d) provides for review every five-year period after 1983 (see supra, at 21-22); no approval is involved.

Section 301(b) itself shows that the limitations which it says must be "achieved" can be derived from the pretreatment standards of Section 307, as well as from effluent guidelines under Section 304(b). It makes no sense, as EPA's argument implies, that there should be regulations under 301 fixing effluent limitations for pretreatment which shall assure compliance with Section 307, when the standards under 307 are made effective by their issuance as regulations under Section 307. All of the sections providing for substantive standards and guidelines come together in permit proceedings; only then does the actual effluent limitation appear.

These provisions all fit together into a comprehensible unitary Act only when Section 301(b) is considered as defining an objective to be achieved. Intervenors have always taken the position that the objective will be achieved by the establishment of effluent limitations. But the effluent limitations are established in permits by application of the guidelines under Section 304 or the standards and limitations under Sections 302, 306 and 307. Uniformity comes not from the mechanical application of a single number, but through administration of a permit system controlled by guideline regulations (and by ultimate veto of State permits) to assure that those similarly situated receive similar effluent limitations in their permits.

III. EPA FAILED TO GIVE NOTICE UNDER THE ADMINISTRATIVE PROCEDURE ACT OF AN INTENTION TO ISSUE EFFLUENT LIMITATIONS BY REGULATION UNDER SECTION 301

Assuming arguendo that the Administrator has authority to issue effluent limitations by regulation, intervenors have pointed out that he failed to give any sufficient notice of his intention to do so and also failed to cite Section 301 as authority for the regulations. EPA now says only the "willfully blind" would fail to perceive that the regulations were being issued as effluent limitations under Section 301. (Resp. Br., at 17.)

But EPA has "blinded" itself to the words of its own preamble to its own proposed regulations. EPA flatly stated that its legal authority rested on Section 304, not 301, in the proposed regulations for these categories. For example, EPA's proposal for the Cement Manufacturing Point Source Category stated:

> "(a) Legal authority:
> "(1) Existing point sources:
> "Section 301(b) of the act requires the achievement by not later than July 1, 1977, of effluent limitations for point sources, other than publicly owned treatment works, which require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of the Act. Section 301(b) also requires the achievement by not later than July 1, 1983, of effluent limitations for point sources, other than publicly owned treatment works, which require the application of best available technology economically achievable which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) to the Act.

> "Section 304(b) of the Act requires the Administrator to publish regulations providing guidelines for effluent limitations setting forth the degree of effluent reduction attainable through the application of the best practicable control technology currently available and the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods and other alternatives. The regulations proposed herein set forth effluent limitations guidelines, pursuant to section 304(b) of the Act, for the cement manufacturing category." (38 Fed. Reg. 24462 (September 7, 1973) (emphasis added).)

For the final regulations for the Cement Category, EPA adopted the same statement of authority. (39 Fed. Reg. 6590 (February 20, 1974).) EPA dealt with each of the eight other categories here in the same fashion.

This state of affairs is not surprising in view of the fact that in its August 6, 1973, "Advance Notice of Public Review Procedures" for the Guidelines and New Source Standards EPA referred to Section 304, not Section 301:

> "Advance notice is hereby given concerning notices of proposed rule making to be published by the Environmental Protection Agency ("EPA") with respect to effluent limitations guidelines, standards of performance, and pretreatment standards for new sources pursuant to sections 304(b), 306 and 307 (c) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, 1314, 1316 and 1317(c); 85 Stat. 816 et seq.; Pub. L. 92-500) ("the Act"). The purpose of this notice is to facilitate public comment upon the regulations to be promulgated under sections 304(b), 306 and 307(c), both before and after the publication of the notices of proposed rule making. In addition, this notice will explain EPA's overall plans for development of effluent limitations guidelines and standards of performance for new sources and the approach which is being taken by the Agency in discharging the duties placed upon the Administrator under sections 304(b), 306 and 307(c) of the Act.

> "EPA believes that the exposure of the technical basis and reasoning underlying regulations to be established pursuant to sections 304(b), 306 and 307(c) is essential to the promulgation of sound effluent limitations guidelines and standards of performance for new sources." (38 Fed. Reg. 24202 (August 6, 1973).)

If these regulations were to be issued under Section 301, it is almost unbelievable that Section 301 would not be mentioned in the same context as Section 304(b). EPA conveniently does not even mention or discuss these statements of legal authority. In Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972), the Court specifically censured another administrative agency for a similar lapse. EPA does not bother to cite or discuss Wagner Electric; it has turned to empty rhetoric to carry its position.

EPA rests its case on this issue on one general sentence in the preamble to the final regulations: "This final rulemaking is promulgated pursuant to Sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act, as amended . . . ." (39 Fed. Reg. 6590 (February 20, 1974).) But, this solitary sentence is a recognition of the fact that, as EPA said on August 6, 1973, "Section 301(b) of the Act requires the achievement by not later than July 1, 1977, of effluent limitations for point sources", whereas "Section 304(b) of the Act requires the Administrator to publish regulations providing guidelines for effluent limitations setting forth the degree of effluent reduction attainable through the application of the best practicable control technology currently available (the 1977

requirement) . . . ." (38 Fed. Reg. 24202 (August 6, 1973) (emphasis added).) In short, given all the prior statements by EPA in proposed regulations, one bare citation of Section 301 in the preamble to the final regulations is not sufficient notice of rulemaking under the teachings of Wagner Electric. It is not even sufficient notice that the final regulations were deemed by EPA to be limitations. For notice that the regulations were limitations, intervenors and everyone else had to wait until after the regulations were published when EPA started making statements respecting its position.

EPA made numerous other statements that it was publishing guideline regulations under Section 304(b), not limitation regulations under Section 301. Intervenors note, for example, that the Development Documents published by EPA for each category after the final regulations were published for the category contains an uniform "Introduction" which states the "Purpose and Authority" for the EPA regulations. The Introduction to the final Development Document for the Phosphate Manufacturing Category is part of the Record in this action and is appended to this Brief as Addendum A. It mentions Section 301(b) as only "requir[ing] the achievement" of technologically based limitations. The regulations were being issued under Section 304(b): "The regulations proposed herein set forth effluent limitations guidelines pursuant to Section 304(b) of the Act for the phosphate manufacturing point source category". (Addendum A; Phosphate Record, at 1654.)

In retrospect, EPA itself, at least in February 1974, appears to have been confused about what it actually was doing. As noted supra,

at 2, EPA added the flexibility clause to the final regulations for these categories after it had proposed the regulations; the clause was not part of the proposals. Even in the clause itself, however, it uses both "limitations" and "guidelines" and mixes them up unmercifully:

> "An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors." (40 C.F.R. §411.12, added by 39 Fed. Reg. 6592 (February 20, 1974) (cement guidelines) (emphasis added).)

And, in mid-August EPA belatedly recognized that only "limited comment [was] provided the Agency before the [flexibility] provision was promulgated . . ." (39 Fed. Reg. 28927 (August 12, 1974)), and it published a Federal Register notice which "invites public comment on the necessity for the variance clause and the manner in which it should be interpreted and applied". (Id.) EPA's notice is appended to this Brief as Addendum B. Intervenors are not in a position to speculate as to what EPA's intentions are in publishing the notice.

Without referring at all to the conflicting and confusing statements it was making when it promulgated the final version of the

regulations at issue here, EPA attaches to its brief copies of correspondence which shows, it asserts, that some Intervenors and the Manufacturing Chemists Association knew the regulations were effluent limitations under Section 301. The most that can be said of this correspondence is that the term "effluent limitation" is used and the proposed regulations are criticized as being inflexible. Nowhere is the question of regulations under 301 mentioned. The term "effluent limitation" (assuming it was being used technically as defined in Section 502(11)) can properly be used to refer to any numerical restriction on discharges, and the proposed regulations appeared to contemplate a numerical restriction on discharges. When the regulations are characterized, they were called guidelines.

In any event, suspicions respecting EPA's ultimate intent by some of those who would be affected by a regulation do not constitute notice of such an intent.[1/]

Accordingly, even if this Court should happen to conclude that EPA does have power to issue limitations under Section 301 by regulation, it should find that EPA's asserted effort to do so here failed to comply with the Administrative Procedure Act, 5 U.S.C. §553.

CONCLUSION

EPA has tried within the past six or eight months to make a sow's ear out of a silk purse. That is, it has wriggled, twisted, and squirmed to transform regulations it proposed as guidelines under

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1/ Even if some of the Intervenors had actually known in advance what EPA now seems to be trying to do, it would not make any difference. As the Court pointed out in Wagner Electric Corp. v. Volpe, 466 F.2d 1013 (3d Cir. 1972), "[t]he fact that some knowledgeable manufacturers appreciated the . . . [particular undisclosed matter], and so responded, is not relevant." (Id. at 1019.)

Section 304(b) for these nine industry categories into limitations under Section 301(b). It now complains to this Court that Congress gave it such a monumental job in dealing with all dischargers in this country that it needs the flexibility provision as a "safety valve". (Resp. Br., at 44.) If it would have stuck with guidelines as the Act provides, it could have avoided its troubles.

Under the Act's system of regulation effluent discharges, EPA is not to publish limitations. The Act commands it to issue guideline regulations. Since Congress did not see fit to include guideline regulations in the category of EPA actions which are specially reviewable in the Courts of Appeals, this Court does not have jurisdiction over this action.

If the Court somehow concludes that EPA does have power by implication to promulgate limitations regulations, then EPA's now-asserted attempt to do so here was ineffective under the Administrative Procedure Act.

Respectfully submitted,

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Dated: September 16, 1974

ADDENDUM A

SECTION III

INTRODUCTION

PURPOSE AND AUTHORITY

Section 301(b) of the Act requires the achievement by not later than July 1, 1977, of effluent limitations for point sources, other than publicly owned treatment works, which are based on the application of the best practicable control technology currently available as defined by the Administrator pursuant to Section 304(b) of the Act. Section 301(b) also requires the achievement by not later than July 1, 1983, of effluent limitations for point sources, other than publicly owned treatment works, which are based on the application of the best available technology economically achievable which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to Section 304(b) of the Act. Section 306 of the Act requires the achievement by new sources of a standard of performance providing for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through the application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

Section 304(b) of the Act requires the Administrator to publish within one year of enactment of the Act, regulations providing guidelines for effluent limitations setting forth the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operation methods and other alternatives. The regulations proposed herein set forth effluent limitations guidelines pursuant to Section 304(b) of the Act for the phosphate manufacturing point source category.

Section 306 of the Act requires the Administrator, within one year after a category of sources is included in a list published pursuant to Section 306(b)(1)(A) of the Act, to propose regulations establishing Federal standards of performances for new sources within such categories. The Administrator published in the Federal Register of January 16, 1973 (38 F.R. 1624), a list of 27 source categories. Publication of the list constituted announcement of the Administrator's intention to establish, under Section 306, standards of performance applicable to new sources within the phosphate manufacturing source category.

SUMMARY OF DEVELOPMENT METHODS

The Environmental Protection Agency has determined that a rigorous approach including plant surveying and verification testing is necessary for the promulgation of effluent standards from industrial sources. A systematic approach to the achievement of the required guidelines and standards includes the following:
(a) Categorization of the industry and determination of those industrial categories for which separate effluent limitations and standards need to be set;
(b) Characterization of the waste loads resulting from discharge within industrial categories and subcategories;
(c) Identification of the range of control and treatment technology within each industrial category and subcategory;
(d) Identification of those plants having the best practical technology currently available (notable plants); and
(e) Generation of supporting verification data for the best practical technology including actual sampling of plant effluents by field teams.

The culmination of these activities is the development of the guidelines and standards based on the best practicable current technology.
This report describes the results obtained from application of the above approach to the phosphate manufacturing industry, defined for the purpose of this study as the following list of products:

Elemental Phosphorus and Ferrophosphorus
Dry-Process Phosphoric Acid
Phosphorus Pentoxide
Phosphorus Pentasulfide
Phosphorus Trichloride
Phosphorus Oxychloride
Sodium Tripolyphosphate
Calcium Phosphates (Non-Fertilizer)

The effluent limitations guidelines and standards of performance proposed herein were developed in the following manner. The point source category was first subcategorized for the purpose of determining whether separate limitations and standards are appropriate for different segments within a point source category. Such subcategorization was based on raw material used, product produced, manufacturing process employed, and other factors. The raw waste characteristics for each subcategory were then identified. This included an analysis of (1) the source and volume of water used in the process employed and the sources of waste and waste waters in the plant, and (2) the constituents (including thermal) of all waste waters including toxic constituents which result in taste, odor, and color in water or aquatic organisms. The constituents of waste waters which should be subject to effluent limitations guidelines and standards of performance were identified.

The full range of control and treatment technologies existing within each subcategory was identified. This included an identification of each distinct control and treatment technology, including both in-plant and end-of-process technologies which are existent or capable of being designed for each subcategory. It also included an identification in terms of the number of constituents (including thermal). The chemical, physical, and biological characteristics of pollutants of the effluent level resulting from the application of each of the treatment and control technologies and the required implementation time were also identified. In addition, the non-water quality environmental impact, such as the effects of the application of such technologies on other pollution problems, including air, solid waste, noise and radiation, were also identified. The energy requirement of each of the control and treatment technologies was identified as well as the cost of the application of those technologies.

The infcrmation as outlined above was then evaluated to determine what levels of technology constituted the best practicable control technology currently available, the "best available technology economically achievable" and the "best available demonstrated control technology, processes, operating methods, or other alternatives." In identifying the technologies, various factors were considered. These included the total cost of application of technology in relation to the effluent reduction benefits to be achieved from the application, the age of equipment and facilities involved, the process employed, the engineering aspects, process changes, non-water quality environmental impact (including energy requirements), and other factors.

The data for identification and analysis were derived from a number of sources. These sources included EPA research information, published literature, previous EPA technical guidance for inorganic chemicals, alkali and chlorine industries, qualified technical consultation, and on-site visits and interviews at notable manufacturing plants throughout the United States. All references used in developing the guidelines for effluent limitations and standards of performance for new sources reported herein are included in Section XIII of this document. Five companies in the phosphate manufacturing industry were contacted. A breakdown of the data base is listed below:

1656

riers, foreign air carriers, and other carriers embodied in the resolution of the Joint Traffic Conferences of the International Air Transport Association (IATA), and adopted pursuant to the provisions of Resolution 590 dealing with specific commodity rates.

The agreement names an additional specific commodity rate, as set forth below, reflecting a reduction from general cargo rates; and was adopted pursuant to unprotested notices to the carriers and promulgated in an IATA letter dated July 30, 1974.

Specific Commodity Item No.	*Description and Rate*
1024.....	Fish, Live, inedible[1] 230 cents per kg., minimum weight 100 kgs. From Jakarta to Los Angeles.

[1] See tariff for complete commodity description.

Pursuant to authority duly delegated by the Board in the Board's Regulations, 14 CFR 385.14, it is not found that the subject agreement is adverse to the public interest or in violation of the Act, provided that approval is subject to the condition hereinafter ordered.

Accordingly, *It is ordered*, That:

Agreement C.A.B. 24567 be and hereby is approved, provided that approval shall not constitute approval of the specific commodity description contained therein for purposes of tariff publication; provided further that tariff filings shall be marked to become effective on not less than 30 days' notice from the date of filing.

Persons entitled to petition the Board for review of this order, pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period, unless within such period a petition for review thereof is filed or the Board gives notice that it will review this order on its own motion.

This order will be published in the FEDERAL REGISTER.

Issued under delegated authority.

[SEAL] PHYLLIS T. KAYLOR,
Acting Secretary.

[FR Doc.74-18390 Filed 8-9-74;8:45 am]

INTERNATIONAL AIR TRANSPORT ASSOCIATION

Order; Agreement Adopted by Traffic Conference 2

AUGUST 7, 1974.

An agreement has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 (the Act) and Part 261 of the Board's Economic Regulations between various air carriers, foreign air carriers and other carriers embodied in the resolutions of Traffic Conference 2 of the International Air Transport Association (IATA). The agreement, which was adopted by mail vote, has been assigned the above-designated C.A.B. agreement number.

The agreement has the effect of revalidating through September 30, 1975, currency-related surcharges on cargo rates from the United Kingdom and Ireland to Africa and applies in air transportation as defined by the Act only to the extent it involves general cargo rates, which are combinable with general cargo rates to/from United States points.

Pursuant to authority duly delegated by the Board in the Board's Regulations 14 CFR 385.14:

It is not found that Resolution 200 (Mail 216) 022m, which is incorporated in Agreement C.A.B. 24543 and which has indirect application in air transportation as defined by the Act, is adverse to the public interest or in violation of the Act.

Accordingly, *It is ordered*, That:

Agreement C.A.B. 24543 be and hereby is approved.

Persons entitled to petition the Board for review of this order pursuant to the Board's Regulations, 14 CFR 385.50, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the Civil Aeronautics Board upon expiration of the above period, unless within such period a petition for review thereof is filed or the Board gives notice that it will review this order on its own motion.

This order will be published in the FEDERAL REGISTER.

Issued under delegated authority.

By:

By the Civil Aeronautics Board.

[SEAL] PHYLLIS T. KAYLOR,
Acting Secretary.

[FR Doc.74-18389 Filed 8-9-74;8:45 am]

ENVIRONMENTAL PROTECTION AGENCY

(FRL 248-3)

VARIANCE PROCEDURES IN EFFLUENT GUIDELINES AND STANDARDS

Interpretation and Request for Public Comment

During the past several months, EPA has promulgated regulations under sections 301 and 304(b) of the Federal Water Pollution Control Act, 33 U.S.C., sections 1311 and 1314(b), defining effluent levels which various industrial categories are required to achieve by July 1, 1977, for their discharges into the navigable waters.

During the public comment period following initial proposal of these regulations, many commenters stated that the proposed regulations were too inflexible and did not sufficiently account for the great amount of variation between individual dischargers within each industrial category with respect to factors influencing practicability of control technology. As a result of these comments, the Agency inserted a variance clause applicable to the effluent control level required by July 1, 1977. This clause reads as follows:

> In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

This clause presently appears in the regulations promulgated for the following point source categories: Feedlots (39 FR 5704); Glass Manufacturing (39 FR 5712); Phosphate Manufacturing (39 FR 6980); Cement Manufacturing (39 FR 6590); Rubber Processing (39 FR 6660); Ferroalloy Manufacturing (39 FR 6806); Asbestos Manufacturing (39 FR 7526); Meat Products (39 FR 7894); Inorganic Chemicals Manufacturing (39 FR 9612); Cane Sugar (39 FR 10522); Grain Mills (39 FR 10512); Canned Fruits and Vegetables (39 FR 10862); Electroplating (39 FR 11510); Plastics and Synthetics (39 FR 12502); Fertilizer Manufacturing (39 FR 12832; nonferrous metals manufacturing (39 FR 12822); Leather Tanning (39 FR 12958); Soap and Detergent Manufacturing (39 FR 13370); Timber Products Processing (39 FR 13942); Organic Chemicals Manufacturing (39 FR 14676); Petroleum Refining (39 FR 16560); Builders Paper (39 FR 16578); Dairy Products (39 FR 18594); Pulp, Paper and Paperboard (39 FR 18742); Canned Seafood Processing (39 FR 23134); Iron and Steel Manufacturing (39 FR 24114); Textile Industry (39 FR 24736).

The Agency has received many inquiries concerning the impact of this variance clause. In response to one such inquiry, the Agency rendered a legal opinion (reprinted below) to the effect that the cost of control is not an element in granting the variance. In response to other comments. The Agency is presently drafting amendments to its procedures for permit issuance, 40 CFR Part 125, which will impose specific public notice requirements with respect to requests for variances. Similar changes are being considered for regulations governing State permit programs, 40 CFR Part 124.

Because of the significant amount of interest which has been expressed regarding the establishment of a variance procedure for these effluent limitations and the limited comment provided the Agency before the provision was promulgated, EPA has determined that an opportunity should be provided for the presentation of additional views on this portion of the effluent limitations. Accordingly, by this Notice, the Agency invites public comment on the necessity for the variance clause and the manner in which it should be interpreted and applied. Comments should be submitted on or before September 26, 1974, and should be sent to the Office of General Counsel, Water Quality Division, Environmental Protection Agency, Washington, D.C. 20460.

Dated: August 2, 1974.

JOHN QUARLES,
Acting Administrator.

[FR Doc.74-18305 Filed 8-9-74;8:45 am]

[FRL-250-4]

PESTICIDES ALDRIN AND DIELDRIN

Suspension of Registrations; Hearing

Notice is hereby given, pursuant to § 164.121(d) of the rules of practice (38 FR 19371, 19378) issued under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 et seq., 1973 Supp.), that a hearing involving the suspension of the registrations and prohibition of the production for use of all pesticide products containing Aldrin or Dieldrin which were subject to and for which appeals were duly filed from the Aldrin/Dieldrin cancellation order issued by the Administrator of the Environmental Protection Agency on June 26, 1972, will begin on Wednesday, August 14, 1974, at 9:30 a.m., in Room 3908, Waterside Mall, 401 M Street, SW., Washington, D.C.

For information concerning the issues involved and other details of these proceedings, interested persons are referred to the dockets of these proceedings on file with the Hearing Clerk, Environmental Protection Agency, Room 1019 East Tower, Waterside Mall, 401 M Street, SW., Washington, D.C.

Dated: August 8, 1974.

HERBERT L. PERLMAN,
Chief Administrative Law Judge.

[FR Doc.74-18557 Filed 8-9-74;8:45 am]

FEDERAL COMMUNICATIONS COMMISSION

[Docket No. 20141, File No. 116-A-L-34; Docket No. 20142, File No. 161-A-RL-34]

GENERAL AVIATION INC., ET AL.

Order Designating Applications for Consolidated Hearing on Stated Issues

In re applications of General Aviation, Inc., Lansing, Michigan; Gerald C. Francis, d/b/a Francis Aviation, Lansing, Michigan; For Aeronautical Advisory Station to serve Capital Region Airport, Lansing, Michigan.

1. The Commission's rules (§ 87.251 (a)) provide that only one aeronautical advisory station may be authorized to operate at a landing area. The above-captioned applications both seek Commission authority to operate an aeronautical advisory station at Capital Region Airport, Lansing, Michigan, and therefore, are mutually exclusive. Accordingly, it is necessary to designate the applications for hearing. Except for the issues specified herein, each applicant is otherwise qualified.

2. In view of the foregoing, it is ordered, That, pursuant to the provisions of section 309(e) of the Communications Act of 1934, as amended, and § 0.331(b)(21) of the Commission's rules, the above-captioned applications are hereby designated for hearing in a consolidated proceeding at a time and place to be specified in a subsequent Order on the following issues:

(a) To determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:

(1) Location of the proposed radio station in relation to the landing area and traffic patterns;

(2) Hours of operation;

(3) Personnel available to provide advisory service;

(4) Experience of applicant and employees in aviation and aviation communications;

(5) Ability to provide information pertaining to primary and secondary communications as specified in Section 87.257 of the Commission's rules.

(6) Proposed radio system including control and dispatch points; and

(7) The availability of the radio facilities to other fixed-base operators.

(b) To determine in light of the evidence adduced on the foregoing issues which, if either, of the applications should be granted.

3. *It is further ordered*, That to avail themselves of an opportunity to be heard, General Aviation, Inc. and Gerald C. Francis, pursuant to § 1.221(c) of the Commission's rules, in person or by attorney, shall within 20 days of the mailing of this Order file with the Commission, in triplicate, a written appearance stating an intention to appear on the date set for hearing and present evidence on the issues specified in this Order. Failure to file a written appearance within the time specified may result in dismissal of the application with prejudice.

Adopted: July 31, 1974.

Released: August 6, 1974.

[SEAL] CHARLES A. HIGGINBOTHAM,
Chief, Safety and Special Radio Services Bureau.

[FR Doc.74-18369 Filed 8-9-74;8:45 am]

[Docket Nos. 19863-68; File Nos. BPH-8051, 8105, 8111, 8234; FCC 74 R-280]

JERRY LAWRENCE, ET AL.

Memorandum Opinion and Order Enlarging Issues

In re applications of Jerry Lawrence, Santa Paula, California; William F. Wallace and Anne K. Wallace, Joint Tenants, Santa Paula, California; Clark Ortone, Inc., Fillmore, California; Class A Broadcasters, Inc., Fillmore, California; For Construction Permits.

1. Before the Review Board for consideration is a petition to enlarge issues, filed March 21, 1974, in which the applicant, William F. Wallace and Anne K. Wallace (Wallace), seeks the addition of the following issue [1]:

To determine whether the proposal of Jerry Lawrence will provide a signal of at least 3.16 mv/m (70 dbu) to all of the city of Santa Paula, California, as required by § 73.315(a) of the Rules.

2. Although Wallace has not shown good cause for the untimely filing of its request, the Review Board is persuaded that the petition raises a serious public interest question which warrants exploration during hearing. See The Edgefield-Saluda Radio Co. (WJES), 5 FCC 2d 148, 8 RR 2d 611 (1966). Thus, provision of a premium signal to an applicant's proposed city of license has long been held to be an important public interest consideration (City of New York Municipal Broadcasting System (WNYC), 38 FCC 2d 511, 25 RR 2d 1178 (1972)), and Wallace has advanced two separate uncontroverted bases, either of which would warrant the addition of the requested issue. First, since the information contained in the Lawrence application does not adequately depict the location of the applicant's 70 dBu contour relative to the city of Santa Paula,[2] the applicant has not established a prima facie showing of compliance with § 73.315(a) of the Commission's rules. Second and more specifically, Wallace alleges that the diffraction loss studies conducted by its consulting engineer indicate that all of the northern portion of Santa Paula would receive less than a 50 dBu signal from the Lawrence pro-

[1] Other related pleadings before the Board for consideration are: (a) statement in lieu of opposition, filed May 20, 1974, by Jerry Lawrence (Lawrence); (b) Broadcast Bureau's petition for acceptance of late filed pleadings, filed May 21, 1974; and (c) Broadcast Bureau's comments, filed May 21, 1974.

[2] As noted by the Broadcast Bureau, the Lawrence exhibit, which depicts the applicant's predicted service contours, appears to be an aeronautical chart, which is designed to show built-up areas as seen from the air, rather than precise geographical boundaries.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY, Respondent; CELANESE CORPORATION, ET AL., Intervenors.	No. 74-1258

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 1974, two copies of Intervenors' Reply Brief in the above-entitled action were served by U. S. mail, first-class postage prepaid, upon each of the following:

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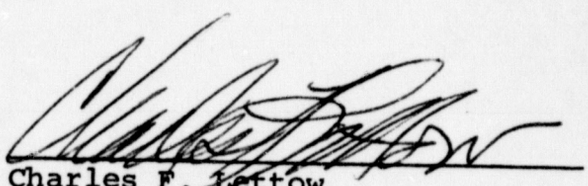

Charles F. Lettow

Dated: September 16, 1974